IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

NO. 26 MISC.

WILLIAM E. FIFE, Petitioner,

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, a corporation, CHAUFFEURS, STABLEMEN, HELPERS and GARAGEMEN, LOCAL UNION 249, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN and HELPERS OF AMERICA, an unincorporated association, B. C. MAZON, President, M. ROSENTHAL, Vice-President, JERRY GRADECK, Recording Secretary, SCOTT F. MARSHALL, Secretary-Treasurer, C. SCANLON, Trustee, WILLIAM ARENSBURG, Trustee, CHARLES MICHAL, Trustee, INDIVIDUALLY AND AS OFFICERS and MEMBERS, REPRESENTING THEMSELVES AND ALL OTHERS HAVING THE SAME INTEREST, J. KENNY and M. J. HANNON, and HAZEL KENNY, Executrix of the Estate of J. KENNY, Deceased.

PETITION FOR REHEARING OF PETITION FOR WRITS OF CERTIORARI

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TABLE OF CITATIONS.

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PETITION FOR REHEARING OF PETITION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, William E. Fife, respectfully, requests a rehearing of his petition for writs of certiorari, denied by this Court on October 13, 1947.

The history of the case, the questions presented, the statutes and law involved, the specifications of error and the reasons for granting the writs are all set forth in the petition for certiorari and brief in support thereof, to which reference is made and will not be repeated here.

GROUNDS FOR GRANTING THE PETITION

Your petitioner feels that a serious error has been made by your Honorable Court in not granting certioraris as requested in this case.

Only the union and its officers filed an answer to the petition for certioraris, the other three defendants remaining silent. The union's answer does not deny the merits of your petitioner's case asserted in the trial court, but is confined to two points, first that no federal question is involved and second, if a Federal question is involved, your petitioner did not properly raise or preserve it in the State Courts.

Due to the vast size of this record, 3643 typewritten pages, including charge, requiring ten weeks trial, some matters were overlooked which we now feel should be called to this Court's attention.

I. Petitioner's Raising of the Federal Question Was Timely.

The respondent union has taken the position that Section 8 of the Act of 1937, P.L. 1138, has been continually present throughout the trial of this case since its inception. Sub-section 1 of Section 3 defines as follows:

> "1"—the term "organization shall mean every unincorporated or incorporated association of employers or employees."

Section 8 of the above act provides as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as

herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond reasonable doubt in criminal cases, and by the weight of evidence in other cases, *and without the aid of any presumptions of law or fact,* both of—(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization." (Emphasis Ours)

The case was originally non suited on the basis of this section and the unconstitutionality of the said section was strenuously urged by counsel for your petitioner in asking the removal of the non suit. The non suit was removed without deciding the constitutionality of this section. All of this is admitted in respondent's answer brief.

The case then went to trial for a second time and we challenge counsel for the respondents to show one place in the entire 3493 typewritten pages of testimony where a single particle of testimony was excluded on the basis of Section 8, of the Act of 1937.

This act and this section apply only in the case of a labor dispute. To show the trial court's position in regard to the fact that your petitioner was not involved in a labor dispute, we call the Courts' attention to this part of the record, overlooked in our original petition and brief.

Examination of one of defendants, M. J. Hannon, by his counsel—Record pages 1465-1466:

"Q. Well now let us come down to October 13, 1937 when these independent truckers started to have labor difficulties?

Mr. Spotts: Objected to as stating a conclusion and not a question.

Objection sustained.

Mr. Oliver: I have not asked the question yet.

The Court: *The question is improper. The independents had no labor difficulties.* (Emphasis Ours)

The above was confirmed in the trial court's charge when it refused the points of the Union and its officers wherein they requested the benefit of Section 8 of the Act of 1937, viz: proof by the weight of the evidence without the aid of any presumptions of law or fact. (T. 3758).

It is further confirmed in the opinion of the court *en banc* where the trial judge stated at page 36 of the Atlantic Reporter, 52 A 2nd, the following:

"In this connection we may add that the plaintiff's evidence would warrant a finding that there was no labor dispute at the A & P., and the provisions of Section 8 of the Labor Anti-Injunction Act of 1937, P.L. 1198, 43 P.S. 206 h would not be applicable in that event."

In light of the above, what was this petitioner to do? A non suit based upon Section 8 of the Act of 1937 had been removed wherein its constitutionality had been argued although no opinion was expressed as to the constitutionality. The case then went to trial again and during a ten-week trial in which 3493 pages of testimony were taken, not a single iota of evidence was excluded

or admitted upon the basis of this Act and the Trial Court, in open court both in its ruling on evidence and in its refusal of points for charge, openly declared that no labor dispute existed in this controversy and reaffirmed its position in its opinion, handed down months later, as shown by the above quotation.

Should your petitioner in its appeal to the Supreme Court of Pennsylvania raise a matter that had not even entered into the trial of the case nor in the opinion for judgment on the record but had been expressly decided in your petitioner's favor when it was raised. We think that your petitioner's position in such a matter is so obvious and elementary that the position of the union in raising it is untenable.

Your petitioner had every reason to expect that the Supreme Court of Pennsylvania would examine the record upon the theory in which the case had been tried in the court below and was completely dumbfounded and surprised when the Supreme Court of Pennsylvania, in reviewing the record as to the union and its officers, affirmed the lower court by injecting into and making a basis of its decision, Sec. 8 of the Act of 1937, saying:

> "In dealing with the evidence said to support the charges against the Union and the three officers it is necessary to consider section 8 of the Act of June 2, 1937, P.L. 1198, 1202, 43 PS 206 h."

and then, in a footnote, reprinted verbatim the entire section. (52 A 2nd 39)

It is respectfully submitted that your petitioner raised the Federal question at the first opportunity in his petition for reargument before the Supreme Court of Pennsylvania. The lower court had held that your

petitioner was not involved in a labor dispute and therefore this section did not apply.

The Supreme Court of Pennsylvania did not follow the long established rule of reviewing the case on the theory upon which it was tried in the Court below, *Weiskircher v. Connelly,* 256 Pa. 387, but instead applied Sec. 8 of the Act of 1937, automatically holding that your petitioner was involved in a labor dispute, a completely different theory than the case had been tried and decided in the lower court and argued in the Supreme Court of Pennsylvania. This case is most certainly within the doctrine of *Brinkerhoff-Faris Trust & Savings Company v. Hill,* 50 Supreme Court 451, 281 U.S. 673, 1930 where Justice Brandeis at page 453 stated:

> *"The additional federal claim thus made was timely, since it was raised at the first opportunity."* (Emphasis Ours)

How anybody can state, in view of the negation of Sec. 8 by the trial court, not only in the taking of testimony, the charge and its opinion, that the injection of this unconstitutional act at the very end of the case by the Supreme Court of Pennsylvania, the first time this act had been held to apply to the instant case, was not the first opportunity of your petitioner to complain of its application and constitutionality, is beyond our comprehension.

II. A Federal Question Is Presented.

Respondent would have this Court believe that the degree of proof under Sec. 6 of the Norris-LaGuardia Act is as great, or greater, than under Sec. 8 of the Pennsylvania Act of 1937. The answer to such a proposition is found in this damnable part of the Pennsylvania Act not found in the Norris-LaGuardia Act:

> **"And without the aid of any presumptions of law or fact."** (Emphasis ours.)

We challenge counsel for the respondent to reveal to this Court one statute, Federal or State, which carries such a provision. We have searched carefully but have not found a single one. True, there are statutes which create presumptions, such as, the production of deeds are made *prima facie* evidence of the regularity of proceedings upon which their validity depends. These and like presumptions established by law are rebuttable, do not estop a defense and takes no question of fact from either the Court or jury as is stated in the case of *Meeker v. Lehigh Valley Railroad Company,* 236 U.S. 412, 35 S. Ct. 328. But measure the clause in Section 8 of the Pennsylvania Act above quoted, by the above standards cited in the *Meeker* case, and it is obvious that methods of proof, available to all litigants from common law and legislative sources, are not applicable against unions, their officers, members and agents involved in a labor dispute.

We are not contesting the constitutionality of Section 6 of the Norris-LaGuardia Act. Every piece of evidence eliminated by this iniquitous section of the Pennsylvania Act would have been admissible under Section 6

of the Norris-LaGuardia Act. Not only does the Norris-LaGuardia Act, not eliminate presumptions of law and fact, but the opinion of this Court in the case of *United Brotherhood etc. v. United States,* 67 Supreme Ct. 775 (Adv. sheet) March 10, 1947, supports our position that unions and others engaged in labor disputes are subject to such proof. We call the Court's attention to the following excerpt from the majority opinion by Justice Reed at page 783 as follows:

> *"There is no implication in what we have said that an association or organization in circumstances covered by § 6 must give explicit authority to its officers or agents to violate in a labor controversy the Sherman Act or any other law or to give antecedent approval to any act that its officers may do.* Certainly an association or organization cannot escape responsibility by standing orders disavowing authority on the part of its officers to make any agreements in violation of the Sherman Act and disclaiming union responsibility for such agreements. Facile arrangements do not create immunity from the act, whether they are made by employee or by employer groups. The conditions of liability under § 6 are the same in the case of each. *The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages, and working conditions may well be sufficient to make the union liable. An illustrative but nonrestrictive example might be where there was knowing participation by the union in the operation of the illegal agreement after its execution.* And the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union."

Such requirements in the instant case could have only resulted in the cause to have been held a jury issue and judgment would not have been entered upon the record. Our record is replete with evidence which would more than satisfy the requirements of Section 6 of the Norris-LaGuardia Act as set forth above. We respectfully submit that the above opinion definitely allows presumption of law and fact, in stark contrast to the Pennsylvania Act which deliberately and actually removes them.

The minority opinion by Justice Frankfurter, joined in by Chief Justice Vinson and Justice Burton, concurring in result, found that the majority opinion immunized and sterilized labor unions from the rules of agency and that no evidence would be sufficient to meet the requirements laid down in the majority opinion. The minority opinion at page 787 states:

> "For practical purposes, this elucidation immunizes unions and corporate offenders for acts which their agents perform because they are agents and, as such, endowed with authority. For practical purposes, a union or a corporation could not be convicted on any evidence likely to exist, if the trial court has to charge what the Court now holds to be required by § 6."

If three members of the Supreme Court of the United States find that Section 6 of the Norris-LaGuardia Act immunizes labor unions and makes it impossible to successfully prosecute them—does not a Pennsylvania Act which is infinitely much broader, in that unions are not subject to presumptions of law and fact, violate the equal protection and due process laws of our Constitution. Does not such a case call for the

granting of writs of certiorari in order that this vital important Federal question may be determined and this damning piece of legislation be removed from the statutes of the State of Pennsylvania where it is still in force, having already caused the economic destruction of your petitioner and many other independent truckers and rendering every small business man in Pennsylvania helpless, when innocently caught in a struggle between labor and capital.

Conclusion.

Petitioner and his counsel represent that this petition for rehearing is not made for the purpose of delay, and that it is directed to the discretion and attention of the Court to the end that the Court might reconsider its order herein wherein it denied his petition, and grant this petitioner a rehearing so that the decision of the State Court may be properly reviewed and finally reversed.

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